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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

MELVIN GLOVER, PETITIONER

v.

CITY OF MEMPHIS, ET. AL.

On Petition For Writ Of Certiorari
To The United States Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MELVIN GLOVER
2645 SMITH RIDGE
MEMPHIS, TN 38127
(901) 357-1177

17pp

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II

QUESTIONS PRESENTED FOR REVIEW

I. Was the Sixth Circuit Court of Appeal's "standard of review" improper, when it reviewed the District Court's decision de novo, in stead of for an abuse of discretion?

II. Was it proper, which the Sixth Circuit held it was so, for the District Court, in it's frivolous determination under 28 U.S.C. section 1915 (e) (2) (B) (i), to sua sponte make "findings of facts" concerning tolling the Tennessee's statute of limitation, section 28-3-104, and thus summarily dismissing the Petitioner's "initial pro se pleading" without any further factual development of the record or without an opportunity to amend?

III. Was there an abuse of discretion in not allowing Petitioner to amend complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure, although the Defendants had not been served with summons complaint and no answer being served?

IV. Did the Court commit abuse of discretion and judicial misconduct by sua sponte dismissing complaint prior to issuance service of process?

III

V. Did the Sixth Circuit conflict with its own ruling in the Aiken County case, *infra* concerning an abuse of discretion when considering the policy of liberality as involved in *pro se* pleadings?

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LIST OF PARTIES TO PROCEEDING

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the on the cover page. A list of all parties
to is the proceedings in the court whose judgment is the subject of this petition is as follows:

1. Melvin Glover - Plaintiff

1. Robert Logan - Defendant (Party never served due to sua sponte dismissal)

2. City of Memphis - Defendant (Party never served due to sua sponte dismissal)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix page to the petition and is

[ ] report at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

The opinion of the United States district court appears at Appendix page to the petition and is

[ ] report at _____:or

[ ] has been designated for publication but is not yet reported; or,

[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at

Appendix___to the petition is

[ ] report at_____; or;

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____court appears at

Appendix____to the petition and is

[ ] reports at _____; or;

[ ] had been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Courts of Appeals decided my cases was April 30, 1999.

[x] No petition for rehearing was timely filed in my cases.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C.section 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____ in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

The Petitioner was shot in the back by Memphis Police Officer Robert Logan and consequently paralyzed from the waist down on February 19, 1996. On March 1, 1996, Officer Robert Logan was terminated from the Memphis Police Department for using deadly force, taken into custody, and charged with aggravated assault. While still in the hospital, on February 27, 1996, eight (8) days after the Petitioner's injury, attorneys were retained to represent the Petitioner in a cause of action against both Officer Robert Logan and the City of Memphis (hereinafter "Respondent" and "Co-Respondent"). On December 30, 1996, ten (10) and one half months after which the attorneys were to represent the Petitioner, the attorneys withdrew from the Petitioner's case. On October 13, 1997, the Petitioner filed his complaint with the United States District Court for the Western District of Tennessee's, claiming, interalia, pursuant to 42 U.S.C. section 1983: (1) that the Respondent willfully and deliberately used unnecessary deadly force when he discharged his service firearm shooting the Petitioner in the back; (2) where it was found in the Memphis daily newspaper, *The Commercial Appeal*, that the Respondent had been in numerous police administrative

hearings for unprofessional firearm-related conduct and had been terminated for such conduct but rehired. Therefore, the Petitioner claims that although the City of Memphis enforced a policy to terminate Respondent Robert Logan for his unprofessional firearm-related conduct in the Petitioner's case, the City of Memphis was "grossly negligent" when it did not enforce a more rigorous policy with the defendant in earlier unprofessional firearm-related incidents, or, is it that, it is so "common and well settled" for the Co-Respondent's police officers to have patterns of unprofessional firearm-related incidents that result in unnecessary use of deadly force as to constitute a "custom" or usage," fairly representing municipal policy; and (3) where the Petitioner filed his complaint after the statute of limitations had expired, the Respondent asserted that,

> Plaintiff has not been able to encourage not one attorney to represent him in this cause, where they continuously put plaintiff off....And not one of those attorneys informed plaintiff that he had a right to represent himself and a Constitutional right to bring his cause before the court to be remedied. These rights were yet acknowledged until plaintiff received a phone call....

On October 28, 1997 the District Court summarily dismissed the Petitioner's complaint pursuant to 28 U.S.C. section 1915 (e)(2)(B)(i). The Court held:

> In any event....this complaint is clearly barred by the statue of limitations. While Plaintiff alleges that he was hospitalized for six week after the shooting and the gunshot injury rendered him a paraplegic, he freely admits that he was notified by the attorney of the one year stature of limitations when the attorney decided not to pursue the civil claim against Logan (Respondent) on December 30, 1996. Plaintiff does not allege what attempts were made in the next month and one half to retain an attorney..... He merely alleges that he was unable to find an attorney and unaware he could file his complaint himself. These allegations provide no basis sufficient to toll the statute.

On June 6, 1998, the Petitioner appealed the District Court's judgment. In the Petitioner's brief, he presented three (3) issues as follow:

(1) Whether the District Court abused its discretion under its frivolous determination when it dismissed

Appellant's complaint under 28 U.S.C. section 1915 (e)(2)(B)(i);

(2) Whether the Interest of Justice and the Federal Principles of Equitable Tolling, in view of the facts,circumstances, the seriousness, and substance of Appellant's case, require a period

of the Tennessee's one year statute of limitations under Tennessee Code Annotated section 28-3-104 to be tolled; and (3) Whether Appellants allege actions by the Respondent that was taken under color of state law as defined under 42 U.S.C. section 1983. In the Petitioner's conclusion, the Petitioner asked for an opportunity to be appointed counsel and an opportunity to amend his complaint.

On April 30, 1999, the United States Sixth Circuit Court of Appeals, thus reviewing the Petitioner's Appeal de novo denied the Respondent's request for an opportunity to be appointed counsel and to amend his complaint, concluded that the District Court properly dismissed the Petitioner's Complaint; and affirmed the District Court's judgment. See Appendix. This petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petitioner submits that there are several reasons that should compel the United States Supreme Court to grant certiorari in this case.

The first reason is that the Sixth Circuits "de novo" standard of review conflicts with the United States Supreme Court's holding in Denton v. Hernandez, 504 U.S. 25 (1992), and other Circuit Courts of Appeals. See Black v. Warren, 134 F. 3d 732 (5th Cir. 1998) ([a]s to the dismissal pursuant to section 1915 (e) (2) (13) (i), we review a determination by a District Court that a case is frivolous for abuse of discretion).

The other reason that should compet the compel the Court to grant certiorari in this case is because the District Court departed from the accepted and usual course of judicial proceedings. Namely, the District Court made "findings of facts" in its frivolous determination on the Petitioner's initial *pro se* pleadings without any further factual development of the record or without giving the Petitioner an opportunity to amend his complaint. Denton v. Hernandez, *supra* (the section 1915 [(e)] frivolous determination, frequently made sua sponte, even

before the defendant has been asked to file an answer, can not serve as a fact finding process for the resolution of disputed facts).

A brief illustration of the District Courts Order of Dismissal, Appendix page, will show that the Court used its frivolous determination as a fact finding process for the resolution of disputed facts concerning tolling the statute of limitations and dismissed the Petitioner's complaint with prejudice where was a need for further factual development of the record. Thus, in the District Court's Order of Dismissal, Appendix page while being mindful that the "statute of limitations in Tennessee for violations of section 1983 is one year," id., the Court recognized that Appellant's injury "occurred...more than one year before the filling of his complaint." At first glance, the Court determined that the Petitioner's "complaint was clearly barred by the statute of limitation." Id.

However, after the Court considered the Respondent's allegations he asserted in support of his delayed filing and recognized that the attorney that was to represent the Petitioner lapsed ten and one half months of the one year limitation

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Holloway v. Carey, 482 F. Supp. 551 (1979). Also, in the Fifth Circuit case of Stephenson v. Gaskin, 539 F2d 1066 (1976), the Court held that *pro se* complaints so inartfully drawn that the court cannot clearly determine grounds for claim of false imprisonment is **not** dismissed in view of liberality with which courts are **required** to construe *pro se* pleadings.

In this case, the United States District Court took it upon itself to sua sponte dismiss Petitioner's complaint without the complaint being served on the Defendants. The Petitioner argues herein that the District Courts action is not only an act of abuse of discretion but also judicial misconduct. Any issue of timeliness of a complaint needs to be challenged by the Defendant, not by the Judge. When a judge raises a defense on behalf of a party, then the judge act as a third party to the Complaint. In this case, if the Defendant had not raised the defense of timeliness, then the defense may have been deemed waived by the Defendant. This in itself is judicial misconduct. Just as the Fourth Circuit has held in the case of Aiken County v. BPS Div. of Envirotech Corp., 866 F2d 661 (1989), that "District Court's sua sponte amendment of plaintiff's complaint was abuse of discretion..." the same should apply as when a District Court sua sponte dismiss a case and raising

questions of law as well as facts to support dismissal prior to issuance of process. Such dismissal should be considered a gross abuse of discretion.

The Petitioner also holds to his argument that the Court should have allowed him to amend his complaint and/or show good cause as to why his complaint "may" have been filed untimely, prior to dismissing his complaint. The Plaintiff is entitled to one amendment "as a matter of course" pursuant to Federal Rule of Civil Procedures 15(a). The Sixth Circuit itself has held in Marks v. Shell Oil Co., 830 F2d 68 (1987), that "considering policy of liberality behind Rule 15, court which fails to even consider motion to amend, much less grant it, has abused its discretion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Melvin Glover

Melvin Glover
Pro Se Petitioner

Date: 9-25-99

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Supreme Court, U.S.
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99 577 JUL 29 1999
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IN THE SUPREME COURT OF THE UNITED STATES

MELVIN GLOVER, PETITIONER

v.

CITY OF MEMPHIS, ET. AL.

On Petition For Writ Of Certiorari
To The United States Sixth Circuit Court of Appeals

APPENDIX

MELVIN GLOVER
2645 SMITH RIDGE
MEMPHIS, TN 38127
(901) 357-1177

No. 98-5141

In The

United States Court of Appeals for the Sixth Circuit

Melvin Glover,
Plaintiff-Appellant,
v.
City of Memphis, Robert Logan,
Defendants-Appellees.

Before: Ryan, Batchelder, and Clay, Circuit Judges

2645 Smith Ridge
Memphis, TN 38127
(901) 357-1177

FILED
APR 30 1999
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth circuit Rule 206 limits citation to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited,a copy must beserved on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Melvin Glover, a Tennessee litigant proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C.§ 1983. He requests the appointment of counsel and the opportunity to amend his complaint. This case has been referred to a panel of the court pursuant to Rule 34(j)(l), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App., P. 34 (a).

Glover filed his civil rights complaint on October 15, 1997, against the City of Memphis and former Memphis Police Officer Robert Logan. Glover alleged that he was shot by defendent Logan on February 19, 1996 at the home of Glover's mother-in-law. It appears from the facts alleged in the complaint that Glover and defendant Logan had been involved in an ongoing dispute involving Glover's wife. Glover sought solely damages. The district court sua sponte dismissed Glover's complaint as frivolous pursuant to 28 U.S.C.A. § 1915(E)(2)(B)(I) (West 1998), after concluding that the complaint was time-barred. Reconsideration was denied. This appeal followed.

Upon de novo review, we conclude that the district court properly dismissed the complaint. *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997). Glover's complaint does not present a rational basis in law, we *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), because it is time-barred by Tennessee's one-year statute of limitations applied to personal injury actions. Tenn. Code Ann. § 28-4-3-104 (1988); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986).

Glover's argument that his failure to file a timely compalint should be excused because he was unable to retain counsel to represent him is without merit. If his argument is liberally construed, see *Jones v. Duncan*, 840 F.2d, 359, 361 (6th Cir. 1998), Glover is arguing that the statute of limitations should be equitably tolled in this case. Several factors are reviewed in deciding whether to apply equitable tolling, including: (1) lack of actual notice of the filing requirements; (2) lack of constructive

knowledge of the filing requirements; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendants; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988).

Glover did not plead facts that would merit tolling the limitations period. He freely admitted that he was notified by an attorney of the one year statute of limitations when the attorney decided not to pursue the civil complaint against Logan on December 20, 1996. He did not allege what attempts were made to retain an attorney or that any infirmity prevented him from retaining or consulting with other attorneys. Neither did he allege that he suffered from any infirmity which rendered him incapable of filing his lawsuit within the limitations period. He merely alleged that he was unable to find an attorney and was unaware that he could file the complaint himself. Such unsupported allegations provide no basis sufficient to toll the statute. Therefore, Glover's complaint is time-barred.

Accordingly, the requests for counsel and an opportunity to amend the complaint are denied, and the district court's judgement is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
(S/Leonard Green, clerk)

No. 97-2955-Tu/A

In The

United States District Court
for the Western District of Tennessee
Western Division

Melvin Glover,
Plaintiff,
v.
City of Memphis, et al.,
Defendants.

ORDER OF DISMISSAL
ORDER ASSESSING APPELLATE FILING FEE

FILED BY WW D.C.
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DEPUTY CLERK

2645 Smith Ridge
Memphis, TN 38127
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Plaintiff Melvin Glover filed a complaint under 42 U.S.C. § 1983, with an application to proceed in forma pauperis on October 15, 1997. It appears from the facts alleged in the application that plaintiff Melvin Glover cannot afford the filing fee and qualifies as indigent under 28 U.S.C. 5 1915(a). The application to proceed in forma pauperis is GRANTED.

The Clerk of Court is ORDERED to file the case and to record the defendant as: City of Memphis and Robert Logan.

The Clerk shall not issue process or serve any papers until further ordered by the Court.

Plaintiff sues the City of Memphis and former Memphis Police Officer Robert Logan. Plaintiff alleges that he was shot by Logan on February 19, 1996 at the home of Glover's wife's mother. It appears from the facts alleged in the complaint that plaintiff and Logan had been involved in an ongoing dispute involving plaintiff's wife.

It is not clear from the facts alleged whether Logan was on duty and acting in the course and scope of his employment as a police officer at the time of the shooting. In order to state a S 1983 claim, plaintiff must allege action under color of state law, West v. Atkins, 487 U.S. 42, 55-57 (1988).

In any event, the shooting occurred on February 19, 1996, more than one year before the filing of this complaint on October 15, 1997. The statute of limitations in Tennessee for violations of 5 1983 is one year. Tenn. Code Ann. § 28-3-104 (1988). See, e.g., Wilson v. Garcia, 471 U.S. 261 (1985); Berrt v. State of Tennessee, 796 F.2d 879 (6th Cir. 1986). This complaint is clearly barred by the statute of limitations. While plaintiff alleges that he was hospitalized for six weeks after the shooting and the gunshot injury rendered him a paraplegic, he was able to retain an attorney to represent him during that time. Plaintiff freely admits that he was notified by the attorney of the one year statute of limitations when the attorney decided not to pursue the civil claim against Logan on December 30, 1996. Plaintiff does not allege what attempts were made in the next month and one half to retain an attorney or that any infirmity prevented him from retaining or consulting with other attorneys.

Neither does he allege that he suffered from any infirmity which rendered him incapable of filing his lawsuit within the time limit. He merely alleges that he was unable to find an attorney and unaware he could file the complaint himself. These allegations provide no basis sufficient to toll the statute.

Although the statute of limitations is normally an affirmative defense that must be raised by the defendants, "[a]n action may be dismissed under 5 1915 (d) where the defense is complete and obvious from the face of the pleadings or the court's own records." Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984).

The entire complaint lacks an arguable basis either in law or in fact, and is therefore frivolous. See Denton, 504 U.S. at 31; Neitzke, 490 U.S. at 325. As the complaint is frivolous, it is DISMISSED pursuant to 28 U.S.C. S 1915(e)(2)(B)(i).

The final issue to be addressed is whether plaintiff should be allowed to appeal this decision in forma pauperis. Twenty-eight U.S.C. § 1915 (a) (3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is frivolous. Id. Accordingly, it would be inconsistent for a district court to determine that a complaint is too frivolous to be served, yet has sufficient merit to support an appeal in forma pauperis. See Williams v. Kullman, 722 F.2d 1048, 1050 n.l (2d Cir. 1983) The same considerations that lead the Court to dismiss this case as frivolous also compel the conclusion that an appeal would be frivolous. It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915 (a) (3), that any appeal in this matter by plaintiff is not taken in good faith, and plaintiff may not proceed on appeal in forma pauperis.

The Sixth Circuit Court of Appeals decisions in McGore v. Wrigglesworth, 114 F.3d 601 (6th Cir. 1997), and Floyd v. United States Postal Service, 105 F.3d 274 (6th Cir. 1997), apply to any appeal filed by the *plaintiff in this came.*, if plaintiff files a notice of appeal, he must pay the entire $105 filing fee required

by 28 U.S.C. IS 1913 and 1917.1 The entire filing fee must be paid within thirty days of the filing of the notice of appeal.

By filing a notice of appeal the plaintiff becomes liable for the full amount of the filing fee, regardless of the subsequent progress of the appeal. If the plaintiff fails to comply with the above assessment of the appellate filing fee within thirty days of the filing of the notice of appeal or the entry of this order, whichever occurred later, the district court will notify the Sixth Circuit, who will dismiss the appeal. If the appeal is dismissed, it will not be reinstated once the fee is paid, McGore, 114 F.3d at 610.

IT IS SO ORDERED this 28th day of October, 1997.
s/JEROME TURNER
UNITED STATES DISTRICT JUDGE

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[1] The fee for docketing an appeal is $100. Us Judicial Conference Schedule of Fees, 1 1, Note following 28 U.S.C. I 1913. Under 28 U.S.C. 5 1917, a district court also charges a $5 fee.

> Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

[2] The district court may extend this deadline one time by thirty days if the motion to extend is filed within the meaning of Houston v. Lack, 487 U.S. 266 (1988), and Fed. R. App. P. 4(c) before the expiration of the original deadline. McGore, 114 F-3d at 610.